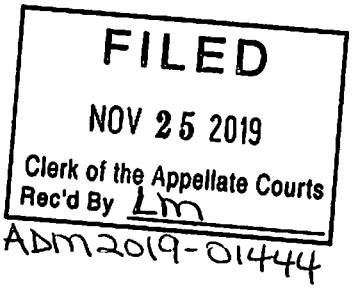
OFFICE OF
CLERK OF THE COURTS
James M. Hivner

SUPREME COURT
COURT OF APPEALS
COURT OF CRIMINAL APPEALS

STATE OF TENNESSEE

November 25, 2019



Supreme Court of Tennessee
Attn: Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: 2020 Rules Package

To the Honorable Justices of the Supreme Court of Tennessee:

The Court recently entered an Order soliciting comments to proposed amendments to the Rules of Civil Procedure. I feel compelled to comment concerning the proposed amendments to Rule 5 and Rule 5B as I believe a revision to the proposed amendments is appropriate to clarify the definition of E-Service. I want to acknowledge that I was present for the discussion of these proposed amendments before the Commission and the Commission made several changes to its proposed amendments based on my comments to that body. Unfortunately, the issues I am raising in this comment were not addressed in the full Commission meetings.

The primary purpose for amending Rules 5 and 5B were to address an oversight in the current versions of the rules with respect to electronic service through an E-Filing system. Since the adoption of Rule 5B, but prior to the recognition of this oversight, four courts (Shelby County Chancery and Circuit, Rutherford County Chancery and Davidson County Chancery) were approved for E-Filing. Two of those Courts did not allow, in their local rules, for service through their E-Filing system as it was clear that the Supreme Court had not approved this type of service in its adoption of Rule 5B. On the other hand, the other two courts adopted local rules, when implementing their E-Filing systems, that treated service through the E-Filing system as proper service under the Rules of Civil Procedure even though this type of service appears to conflict with the current Rules of Civil Procedure. Last year, upon reviewing new applications for implementation of EFiling systems, the Technology Oversight Committee (the Committee tasked with reviewing applications for implementing E-Filing in the trial courts) noticed that each new proposed E-Filing court was intending to adopt local rules that treated service through the court's E-Filing system as proper service under the Rules of Civil Procedure which, as stated previously, appears to be in conflict with the current Rules of Civil Procedure. This matter was brought to the attention of the Supreme Court and, earlier this year, in an effort to accommodate this type of service and avoid having to require the current courts permitting E-Filing to amend their local rules until a rule revision could be approved through the Rules Commission process, the Supreme Court adopted Supreme Court Rule 46A.

The Rules Commission has now proposed a revision to Rules 5 and 5B to address the purpose of Rule 46A. Having reviewed the revised proposed amendments to Rule 5 and 5B approved by the Commission, it appears to me that an additional modification is necessary to clarify what is meant by E-Service. The proposed Rule 5 makes clear that any document that is E-Filed may be E-served and that such E-service is effective service under the Rules of Civil Procedure. This is clearly the intent of the Commission and Rule 46A adopted by the Supreme Court. The definition of E-Service is included in proposed Rule 5B and states the following: "E-service" or "E-served" means the automatically generated electronic transmission, by and through an E-filing system, of a notice or document to all participants in a case who are registered users.

It is this definition that I believe needs modification. In addition to the fact that the definition does not clarify what the notice entails (i.e. notice of the filing of a document), in some instances, even meeting the definition of E-service does not comport with the expectations of service, in my opinion. The purpose of service, in my opinion, is to ensure that a document filed with the court by one party is provided to the other party(ies). Therefore, if the E-Filing system emails the document to the other party, that meets the expectation. If the E-Filing system just sends notice that a document has been filed, that does not appear to meet the expectation of service since the other party does not have access to a copy of the actual document. Current E-Filing systems, of which I am aware, are designed to do one of the following upon the e-filing of a document as follows:

(1) Send an email Notice of the filing of a document to a Registered User along with a copy of the document attached to the email;

(2) Send an email Notice of the filing of a document to a Registered User and include a hyperlink to the document in the email; or

(3) Send an email Notice of the filing of a document to a Registered User and advise the Registered User that the document may be accessed in the E-filing system.

Numbers 1 and 2 are clearly in line with the purpose of service, in my opinion. The filed document is provided to the other parties. It's just a matter of whether they must click on the hyperlink or the attached document to view the document. Number 3 appears to be a little different as the other party is not receiving the document but is being advised of what actions can be taken to access the document. Rule 46A appears to have been drafted to accommodate that type of notice. I assume it was considered to not be overly inconvenient to have to login to the E-Filing system and see the document since that could still be done with the click of a few buttons on your computer. Access to the document was being provided. This appears to be a reasonable extension of the current service rules.

The issue arises with the fact that some E-Filing systems that are using number (3) for notification are not providing access to all documents through the E-Filing system. I do not believe this possibility was considered when drafting Rule 46A and this newly drafted amendment to Rule 5B also does not appear to consider this possibility. The definition of E-service merely requires the sending of a notice and access to the document is not required.

Therefore, in some instances, a document may be filed and, for purposes determined necessary by the clerk or court, the document will not be accessible through the E-Filing system. When the other party receives the email notification that the document has been filed, the party will not have access to the document through the E-Filing system. This could happen if for instance a document is filed that is deemed confidential and the E-Filing system security is not designed to limit access to only case participants. The E-Filing system will not allow anyone access to the document. This appears to be what is happening with some of these E-Filing systems. Under the proposed Rule 5B, the notice sent to the other parties will be deemed proper service even though the other parties will not even have access to the document without calling the clerk or the filing party to get a copy.

To address this issue, I recommend an amendment to the proposed definition of E-served or E-service as follows:

"E-service" or "E-served" means the automatically generated electronic transmission to all participants in a case who are registered users, by and through an E-filing system, of (i) a notice of the filing of a document with a copy of the document attached, (ii) a notice of the filing of a document with a hyperlink to said document or (iii) a notice of the filing of a document and the document can be accessed by the registered user in the E-Filing system.

Thank you for your consideration.

Sincerely,

James M. Hivner

ADM2019-01444

appellatecourtclerk - Comments on Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

From: Jack Burgin <jcburgin@kramer-rayson.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/18/2019 10:57 AM
Subject: Comments on Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

To whom it may concern, my practice is primarily in federal court and, from that perspective, I offer comments on the Proposed Amendments to the Tennessee Rules of Civil Procedure (No. ADM2019-01444)

The changes to Rule 5.02(2)(a) appear to stylistic but I will state that, in my experience, almost no attorney complies with the requirement to certify via mail, facsimile or hand-delivery that a document has been served by email. Few if any attorneys appear to me to even know of the requirement, or at least they appear to be unaware of it when I call the requirement to the attorney's attention (and say I agree to waive the certificate). Email is generally a reliable means of delivering documents (usually as reliable as mailing) so I suggest either presently or in a future advisory commission recommendation that the certification requirement be dropped or modified to permit the kind of general agreement contemplated by Federal Rule 5(b)(2)(E). Alternatively, written certification could be contingent upon events contemplated by Rule 5.02(b) or the lack of a reply email acknowledging service by email.

The amendment to Rule 5.02(c) continues to provide that the "mailbox rule" (which, as the Court explained in the decision cited below, means an three days added under Rule 6.05) applies to documents served by email. Similarly proposed Rule 5.02(3) (and proposed Rule 5B) retains the mailbox rule for E-filed documents. Absent a statutory requirement (and I know of none) the mailbox rule no longer applies in federal court when documents are sent by the court's CM/ECF filing system or sent electronically by agreement. Federal Rule 6(d). When the federal rules made this change it did not, to my recollection, trigger a revolt at the "loss" of three days to respond. There is merit in having rules such as this be uniform and I see no reason under Tennessee law to continue having a different practice in state versus federal court.

With the above exceptions and a clarification I mention next, I favor the amendments proposed in Rule 5.02(3) and Rule 5B.

Perhaps I missed it but I am unable to determine whether proposed rule 5.02(3)(c) intends to apply the mailbox rule to the transmission of court orders sent electronically. Of course, this is not a new issue. *Binkley v. Medling*, 117 S.W.3d 252, 257 (Tenn. 2003), held the mailbox rule in Rule 6.05 did not alter the time for filing a Rule 59 motion to alter or amend: "Rule 6.05 applies only when a party is required to do some act after service of a notice or other paper and does not apply when the doing of the act is triggered by some other event, like the entry of a final judgment." The Court agreed with the holding in *Begley Lumber Co., Inc. v. Trammell*, 15 S.W.3d 455, 457 (Tenn. Ct. App. 1999), that Rule 6.05 does not apply to extend by three days the time for filing a notice of appeal when a copy of the entered judgment, requested pursuant to Rule 58, is sent by mail.

Proposed rule 5.02(3)(e) could be interpreted to change the holding in *Binkley* and the decisions it cited when court orders are electronically transmitted. Presumably, *Binkley* would prohibit application of the mailbox rule to orders served by mail. At a minimum, then the proposed rule might create unintended confusion and could lead to different time limits which depend on whether the order was sent electronically or by mail. Proposed Rule 5.02(3)(e) states a "document that is E-served shall be treated as a document that was mailed for purposes of computation of time under Rule 6." This could be interpreted (or argued) to mean that orders sent electronically are "documents" within its scope. Again, maybe I missed something, but I can find no contrary provision in the proposed rule and the comments do not appear to address this issue.

For these reasons, I respectfully suggest the Advisory Commission or the Court clarify whether the mailbox rule applies when court orders are sent electronically.

I am not in favor of the changes to proposed Rule 26.07. I must acknowledge that I am not a fan of the initial disclosures requirement in federal court but recognize that they serve a purpose. I do not, therefore, opposed adopting the same concept in the Tennessee rules. My opposition is to the wording in Proposed Rules 26.07(1)(A) & (B). As written, these proposed rule require identification or production of persons or documents "relevant to the claims or defenses of any party, whether or not supportive of the disclosing party's claims or defenses." I strongly oppose the requirement to disclose information or documents that are not "supportive . . . of the disclosing party's claims or defenses."

As the comment notes, the Advisory Commission is aware that this goes beyond the requirements in Federal Rule 26(a) after the 2000 amendments. See comment to 2000 Amendments to Fed. R. Civ. P. 26 ("A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use."). Unfortunately, the comments do not explain why the Advisory Commission chose to be different. That lack of explanation is unfortunate, in my view. In my experience under the federal rules before the 2000 Amendments, the similar requirement proved unworkable, was often ignored, and usually led to disputes over whether a party had complied with the requirement shortly before trial. This resulted in delays and diverting attorney resources away from trial preparation.

If the proposed rule is not changed, moreover, I also oppose the requirement to provide e-mail addresses for "each person" identified in proposed rule 26.07(1)(A). A witness can always agree to communicate by email but this proposed rule effectively forces the witness to receive emails from counsel. As ubiquitous as email communications are, receiving an unsolicited or unanticipated email from an attorney (and in some cases from an attorney the witness considers to be adverse) will needlessly upset many witnesses. As defense counsel, I do not relish having to inform witnesses I may be meeting for the first time that I have to provide their email addresses (whether personal or work) to opposing counsel.

I generally favor proposed rule 26.07(1)(D). I anticipate a question arising about whether a "document" under proposed rule 26.07(1)(D) is the same as a "written instrument other than a policy of insurance" as meant in Rule 10.03. Presumably, the "document" production requirement will not require mandatory disclosure of insurance policies even when a "pleading" refers to an insurance policy. Neither the proposed rule or the comments addresses this. I also suggest that the comments to proposed rule 26.07(1)(D) clarify that it is not intended to modify or alter the

requirements in Rule 10.03 which require attaching a "written instrument" to a pleading when the claim or defense is founded on that written instrument.

I do not agree that proposed rule 26.07(1)(D) should be inapplicable to class actions, as implied by proposed rule 27.07(4)(E). Putative class action complaints are often founded on documents of some kind and I do not understand why these type of pleadings should be exempted from this aspect of the mandatory disclosure rule.

Proposed rule 27.07(4)(E) is also slightly ambiguous. "Class actions" are not class actions until the court certifies the class. Of course, that typically occurs, if at all, well after the mandatory disclosures would be due. If this exception is retained, perhaps the comments could clarify that this exception applies to complaints which include class allegations.

I thank the Court and the Advisory Commission for its work and the opportunity to comment. Should there be any questions, please let me know. These comments are my own. They are not intended to reflect the views of my clients or the other members of my law firm.

Jack Burgin
Kramer Rayson LLP
865-525-5134 (office)
865-300-7978 (mobile)

ADM2019-01444

FILED
OCT 18 2019
Clerk of the Appellate Courts
Rec'd By KM

appellatecourtclerk - ADM2019-01444

From: Mark Smith
To: appellatecourtclerk
Date: 10/18/2019 10:03 AM
Subject: ADM2019-01444

Dear Mr. Hivner, The proposed changes in the rules are very interesting and will change the ways attorneys practice, especially New Rule 26.07. As stated in the Advisory Commission Comments , "As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request , of four types of information that have been customarily secured early in litigation through formal discovery." This will benefit the litigants and should allow the case to move more quickly to mediation or settlement. The vast majority of the Bar never reads these proposed new rules. The AOC needs to advise the Bar theses rules are coming so they can make the necessary adjustments to be able to comply with these rules when adopted.

Mark T. Smith, Sumner County Clerk and Master
100 Public Square, Room 401
Gallatin,Tn 37066
(615) 452-4282 Telephone
(615) 451-6031 Fax
mark.smith@tncourts.gov

appellatecourtclerk - Proposed amendment to TRCP 26

ADM2019-01444

FILED
OCT 10 2019
Clerk of the Appellate Courts
Rec'd By KM

From: "Mark R. Orr" <markrorrlaw@gmail.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/10/2019 4:01 PM
Subject: Proposed amendment to TRCP 26

To whom it may concern:

I am greatly troubled by the prospect of the proposed Rule 26.07, especially in the context of family law cases, which comprise the majority of my practice. Not only will it prove unreasonably burdensome on smaller law offices, but it will pretty much ensure pro se litigants are unable to navigate the waters of discovery causing additional exasperation for the clerks, judges and opposing counsel dealing with them. Additionally, and perhaps more importantly, mandatory disclosure of fact witnesses in divorce cases will almost ensure that many matters, which could have been settled by agreement, will mushroom cloud into pitched battles.

I have had repeated discussions with our colleagues, over the years, regarding the effect discovery is having on our ability to try lawsuits in a timely and cost efficient manner. I have been surprised to learn, during the course of these discussions, that no one is in favor of expanded discovery. I assumed that those at larger defense firms and those who do not seem to bat an eye at billing astronomical fees would be in favor of such changes. The bottom line is ever expanding discovery is having a chilling effect on litigation, as many clients cannot afford to see a lawsuit through to its conclusion, given the associated costs. I apologize if my input comes off as whining, but I would strongly urge some reconsideration before these proposed changes are implemented. While they may be spurred by good intentions, their effect on day to day practice and our business models may prove overwhelming to many.

Thank you for your time.

Mark

Mark R. Orr, Esq.
LAW OFFICES OF MARK R. ORR
616 W. Hill Avenue
Knoxville, Tennessee 37902
Phone: (865) 437-5301
Fax: (865) 437-5084

Please reply to the sender or contact our firm at 865.437.5301 and let us know that you have received the message in error. If received in error, please delete this message. Thank you.

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From: "Joe Neufeld" <jneufeld2000@aol.com>
To: <lisa.marsh@tncourts.gov>
Date: 10/11/2019 9:34 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Friday, October 11, 2019 - 9:34am
Submitted by anonymous user: [162.200.145.170]
Submitted values are:

Your Name: Joe Neufeld
Your Address: 166 Pryce Street, Santa Cruz, CA 95060-2872
Your email address: jneufeld2000@aol.com
Your Position or Organization: I am just a simple, unwashed member of the public
Rule Change: No comments taken at this time
Docket number: TRCP ADM2019-01444
Your public comments:
I applaud your amendments to Tennessee Rules of Civil Procedure §33.01 regarding objections made to discovery requests.

Oftentimes, response to written discovery requests contain objections, the purpose being to extend the time in which a response is due, rather than help narrow or define or shape the issue underlying the discovery request.

When a dispute over a discovery issues surfaces, the parties are required to meet and confer, prior to any court involvement. A party may interpose a meritless objection in order to invoke this "meet and confer" prerequisite in order to buy more time to respond. These proposed amendments will help curb such abuse.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/26646

WILLIAM D. VINES, III *†
JAMES C. WRIGHT
G. KEVIN HARDIN
EDWARD U. BABB
JOHN W. BUTLER
WELDON E. PATTERSON*
LOUIS W. RINGGER (BILLY)
GRANT E. MITCHELL

Of Counsel
RONALD C. KOKSAL
DONNA R. DAVIS *
LESLIE A. MUSE
JAMES KELLY GIFFEN

*Rule 31 Listed General Civil Mediator

†Board Certified Civil Trial Advocate
National Board of Trial Advocacy

BUTLER & VINES & BABB
Attorneys at Law

Butler, Vines and Babb, P.L.L.C.
2701 Kingston Pike
Knoxville, Tennessee
37919

Telephone: (865) 637-3531
Facsimile: (865) 637-3385
Web. www.bvblaw.com

Firm Medical Consultant
FRED GRELLO, MD

September 24, 2019

Sender:
James C. Wright
Partner
Direct Dial: (865) 244-3920
E-mail: jwright@bvblaw.com

James Hivner, Clerk
Re: 2020 Rules Package
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: T.R.C.P. - ADM 2019-01444

Dear Mr. Hivner:

I am submitting the following comments as it would relate to the advisory commission's recommendations to the Court, said comments being submitted within the December 13, 2019 deadline.

Proposed Change to Rule 26.07 – Mandatory Disclosures

I have not seen a statement of the reason or need for the recommendation in regard to this drastic and significant change to the TRCP. The existing rules provide adequate and sufficient means to obtain discovery as parties may need, while at the same time protecting doctrines such as work product, attorney-client privilege, matters and information obtained "in anticipation of litigation." This rule appears to attempt to abrogate or certainly an argument would be made that said rule would abrogate same. For instance, either a plaintiff attorney or a defendant attorney may spend significant time and money investigating a matter and may learn both positive and negative matters during their investigation. In a significant construction products liability or medical malpractice matter, this could be in the tens of thousands, if not more. Rule 26.07 would appear to require and impose a continuing duty to disclose such information and impose a duty upon the attorney signing by way of verification subjecting to sanctions.

Further, one of the reasons that many parties (and attorneys) seek to avoid Federal Court are the additional costs to the clients in relationship to compliance with rules, including the Federal rule on disclosure. This rule alone in Federal Court generates significant time (and

thereby costs to the client for compiling and creating the information necessary for this disclosure). Parties also still get interrogatory sets that they also have to comply with as well. Therefore, practicing in Federal Court is significantly more costly to parties than it is in State Court.

Beyond this, the rule will create its own "cottage industry" of practice relating to motions to declare disclosures inadequate, incomplete or simply not filed timely. For a *pro se* litigant, this rule would likely make access to courts impossible. In fact, this rule change contemplates the creation of an enforcement practice relating to the disclosures in the verification process, as well as a change to Rule 37 to provide for a sanctions mechanism. In essence, we are simply creating another whole realm of unnecessary pleadings, when the very matters sought can be obtained through ordinary discovery. This rule disadvantages parties that have significant monies to obtain information through their counsel by requiring them to divulge this information to parties who have not prepared or done their homework, while at the same time also disadvantages clients who are not wealthy enough to go through the efforts to comply with an additional layer of discovery process, as well as motions that will be generated that their disclosures were inadequate and untimely.

In short, I do not see a modified federal disclosure system as being an improvement over the present Tennessee system, when as an attorney I can obtain the same information through discovery without the unnecessary costs that the federal courts burden a party with to comply with this rule. There simply appears to be no true compelling reason to create an entire new set of motion practices relating to disclosures.

At present, when I meet with a client I will go through with them generally the costs of different matters and steps in litigation. The disclosure requirements by their very nature add an additional cost factor to the client. Even in a relatively straightforward and small case, the requirement to investigate and put together disclosures, supplement the disclosures and deal with motion practices relating to it will add thousands of dollars to the litigation costs. In a large case involving a products matter, construction issue or a medical malpractice, the costs could be in the tens of thousands of dollars. While this proposed rule change is well meant, it simply creates a cost factor for clients that is unnecessary in light of the current rules that provide the basis to obtain adequate discovery and creates a whole new realm of motion practices that would unnecessarily burden litigants, lawyers and the courts.

The Tennessee Rules of Civil Procedure in regard to discovery are not broken. They work adequately. This extra burden does not enable a party to gain any particular additional evidence that could not be obtained through ordinary discovery. At the same time, however, it creates the potential for an argument that long-standing principles relating to work product and matters prepared in anticipation of litigation may be abrogated by this rule and creates a mine field for compliance.

BUTLER & VINES BABB
Attorneys at Law

I would request that Rule 26.07 be left as is, as well as Rule 37. This is not meant as any negative to the Committee and is hopefully not taken as such.

Very truly yours,

James C. Wright

JCW/pad

appellatecourtclerk - Tennessee Supreme Court Proposes Mandatory Pretrial Discovery Disclosures in Divorce Litigation

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From: Zale Dowlen <zale.dowlen@outlook.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 8/21/2019 10:05 AM
Subject: Tennessee Supreme Court Proposes Mandatory Pretrial Discovery Disclosures in Divorce Litigation
Cc: Kimi deMent <Kimi.deMent@tncourts.gov>

Dear Court:

Thank you for the comment period on this issue. As an attorney who assists low income individuals and who handles a few divorces, this proposal seems to create an even greater chasm between the low income individuals, who want and/or need a divorce, and the ability to get one. Essentially, this proposal only assists the trial attorneys who need an excuse for unnecessary discovery.

This seems to run contrary to the "Access to Justice" mindset that the court has been striving to achieve. I hope this helps.

ADM2019-01444

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Clerk of the Appellate Courts
Rec'd By LM

Rule 26

Zale Dowlen, Esq
Attorney & Counselor at Law
www.DowlenLaw.com

Mailing:
PO Box 335
Goodlettsville, Tennessee 37070-0335

Office:
The Smith & Sellers Building
100 North Main Street, Suite N
Goodlettsville, Tennessee
(Entrance and parking is in the rear of the building on Lick Street.)

Phone: (615) 497-0763
Fax: (888) 840-4269

"Your plans will fall apart right in front of you, if you fail to get good advice.
But if you first seek out multiple counselors, you'll watch your plans succeed."
Proverbs 15:22 TPT

appellatecourtclerk - Rukle 26 Mandatory Disclosures

ADM2019-01444

FILED
SEP 23 2019
Clerk of the Appellate Courts
Rec'd By LM

From: William cremins <wmcremins@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 9/20/2019 10:47 AM
Subject: Rukle 26 Mandatory Disclosures

TENNESSEE RULES OF CIVIL PROCD.

As you solicited comments about mandatory disclosure in civil actions, I write to endorse the idea.

Especially in personal injury cases, disclosure of information, such as data and information required maintained by federal and/or state law ought to be disclosed without a request.

In truck crash litigation, for example, the truck company should mandatorily tender to the plaintiff all documents and things required maintained by the Federal Motor Carrier Safety Regulations, including the driver's personnel file, logs for three months before the crash, trip records for the last three months before the crash including bills of lading, contracts incident to the load(s) carried at the time of a crash and lease agreements for the tractor, trailer, and any leased equipment involved in the crash, radio frequency device information, geolocation data for the last three months before the crash, and history of driving infractions of the truck driver. Drug tests of the truck driver also ought to be subject to mandatory disclosure if performed after a crash. This will expedite discovery, faciliatate settlement, and relieve judges of discovery disputes.

In divorce cases, local rules of some counties require tendering finanaical affidavits of income and expenses, and certain documents and things pertaining to electronically stored information. Each party to a divorce ought to be required to share any investment documents and pension documents involving marital property. Each ought to provide the other a list of insurance products, including sums paid into any insurance products, without a request for same.

Bill Cremins